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No. 00-952

IN THE

Supreme Court of the United States

WISCONSIN DEPARTMENT OF
HEALTH AND FAMILY SERVICES,

Petitioner,

v.

IRENE BLUMER,

Respondent.

ON WRIT OF CERTIORARI TO THE
WISCONSIN COURT OF APPEALS, DISTRICT IV

BRIEF OF *AMICI CURIAE* OHIO STATE BAR ASSOCIATION AND NATIONAL ACADEMY OF ELDER LAW ATTORNEYS IN SUPPORT OF THE RESPONDENT

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The Ohio State Bar Association and the National Academy of Elder Law Attorneys respectfully submit this brief *amici curiae* in support of the Respondent in this case.[1]

The Ohio State Bar Association is a professional association, which represents 25,000 members in the State of Ohio. The board of governors of the Ohio State Bar Association unanimously approved the filing of an Amicus brief in this case on or about September 14, 2001.

The National Academy of Elder Law Attorneys is a professional association of approximately 3,700 attorneys who primarily represent the elderly and the disabled. The board of directors unanimously approved the filing of an Amicus brief in this case on or about July 21, 2001.

The two professional organizations file this *amici curiae* brief based upon their shared concern for well-being of the community spouses, particularly women who usually have a lower fixed income, within the State of Ohio and throughout the country. It is also the position of these two professional organizations that granting *Chevron*-type deference to agency proclamations such as those in this case, undermines the legislative intent and the legislative process.

GLOSSARY

For the Court's assistance, the following glossary of terms and abbreviations will be used throughout this Brief:

HHS — United States Department of Human and Health Services.

HCFA — Health Care Financing Administration of the U.S. Department of Health and Human Services, now

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1. Pursuant to Rule 37.6, the *amici* states that neither counsel for the Respondent or the Petitioner authored this brief in whole, or in part, nor did any person or entity other than the *amici* make any monetary contribution to the preparation or submission of the brief. Respondent and Petitioner have consented to the filing of this brief and such consents are being lodged herewith.

known as The Centers for Medicare and Medicaid Services.

IS — Institutionalized Spouse

• Married, living in a nursing facility, with his spouse residing in the community. 42 U.S.C. § 1396r-5(h)(1). In this Brief, the IS will be referred to using the masculine pronoun and the CS will be referred to using the feminine pronoun.

CS — Community Spouse

• Married, living in the community, with her spouse in a nursing facility. 42 U.S.C. § 1396r-5(h)(2).

MCCA — The Medicare Catastrophic Coverage Act of 1988. 42 U.S.C. § 1396 et seq. provides protection for CS from impoverishment.

CSRA — Community Spouse Resource Allowance

• A resource level designed to protect the CS from impoverishment and calculated at one-half of all countable resources, with a minimum and a maximum level; in 1996 the minimum was $15,348 and the maximum was $76,740. 42 U.S.C. § 1396r-5(f)(2). The 2001 levels are a minimum of $17,400 and a maximum of $87,000. The States are permitted to establish the minimum anywhere between these two figures. Twenty-one (21) States and the District of Columbia currently use the lowest possible CSRA, while twenty-two (22) States currently use the highest CSRA as the minimum.[2]

2. States using the minimum CSRA are: Arizona, Arkansas, Connecticut, District of Columbia, Indiana, Kansas, Maryland, Michigan, (Cont'd)

MMMNA — Minimum Monthly Maintenance Needs Allowance

• An income level designed to protect the CS from impoverishment and set at 150% of the federal poverty level; for 1996, $1,295 per month as the minimum and a maximum of $1919 per month. 42 U.S.C. § 1396r-5(d)(3). The 2001 levels are $1452 and $2175 respectively, per month. The States are permitted to establish the minimum anywhere between these two figures. Thirty-one (31) states currently use the lowest allowable MMMNA, while sixteen (16) states and the District of Columbia currently use the highest MMMNA.

(Cont'd)
Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, Ohio, Rhode Island, Tennessee, Texas, Utah, Virginia and West Virginia. States using the maximum CSRA are: Alabama, Alaska, California, Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Maine, Massachusetts, Mississippi, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Vermont, Washington and Wyoming.

States using the minimum MMMNA are: Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, New Hampshire, New Jersey, Montana, New Mexico, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Vermont, Virginia, Washington and West Virginia. States using the maximum MMMNA are: Alaska, California, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kentucky, Louisiana, Mississippi, New York, North Dakota, Oklahoma, South Dakota, Texas, Utah and Wyoming. John J. Regan and Michael Gilfix, *Tax Estate and Financial Planning for the Elderly* (1999).

CSMIA Community Spouse Monthly Income Allowance

• An allowance that is calculated after an IS is determined to be eligible for Medicaid to determine if the CS is also entitled to part of the IS's income. 42 U.S.C. § 1396r-5(d)(2).

SUMMARY OF ARGUMENT

Petitioner's appeal is not well taken for several reasons, any one of which is sufficient to affirm the Wisconsin Appellate Court's order. The underlying position of the Ohio State Bar Association (hereafter OSBA) and the National Academy of Elder Law Attorneys (hereafter NAELA) is:

The Court of Appeals correctly concluded that the State of Wisconsin violated the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988. 42 U.S.C. § 1396, et seq.

1. The statute is clear and unambiguous.

The spousal impoverishment provisions of the MCCA are clear and unambiguous and establish a statutory application and appeal process. A CS is entitled to retain resources which will generate income which, when added to her other income, will help her achieve a monthly income which reaches the MMMNA set by federal statute.

2. The HCFA's "income first" rule is directly at odds with the spousal impoverishment protection of the MCCA.

An "income first" rule would require a couple to spend down resources and force a CS to rely on the income of the IS. The MCCA's goal was to give the CS assets "up front" so she does not have to worry about what happens to the IS's income, upon the death of the IS.

3. The State of Wisconsin has other more appropriate remedies.

The Appellant's implementation of the "income first" rule is not the appropriate remedy for the financial hardship mentioned in the Appellant's brief. The state could withdraw from the program, lobby Congress to change the statute, or adjust the minimum levels for the CSRA and MMMNA to lessen the fiscal impact of the MCCA.

4. The legislative history of the MCCA does not support the Petitioner's argument.

There is no need to examine the legislative history in the instant case since the relevant statute is clear and unambiguous. However, an examination of legislative history does not support Appellant's "income first" argument and instead, reveals Congress' intent to first protect the CS from impoverishment through a transfer of resources.

5. The HHS and the HCFA are not entitled to deference relating to — 42 U.S.C. § 1396r-5(e)(2)(C).

The relevant federal statute is clear and unambiguous; therefore, there is no need for an "interpretation." There are no regulations in place. If, however, an interpretation is needed, HCFA waited 13 years, after the Court accepted jurisdiction, to offer a proposed regulation, which supports the state's argument. There is nothing to which to defer.

ARGUMENT

The Court of Appeals correctly concluded that Appellants violated the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988, 42 U.S.C. § 1396, *et seq*.

1. The statute is clear and unambiguous.

When a person is institutionalized, he may apply for the payment of some or all of his medical expenses out of the joint state and federal Medicaid funds established pursuant to the MCCA.

The statutory section that deals with married couples, one of whom has been institutionalized, is 42 U.S.C. § 1396r-5. That section sets forth the Medicaid application process and the steps that must be followed in determining whether the IS is eligible for Medicaid benefits.

When an application for Medicaid benefits is filed, the county worker determines the "countable" assets and then divides the countable assets equally between the CS and the IS. Ohio and many other states offer the most minimal protections. Many elderly couples in Ohio, would be financially devastated by an "income first" rule. The workings of this process are often best described with examples. These are all Ohio examples, but are consistent with the rules in 20 other states and the District of Columbia.

Example 1
The husband entered into the nursing home in 1996 with his wife residing in an apartment, with countable assets of $32,000, and each receiving $650 per month of Social Security. Under an "income first" approach, the state would deny Medicaid eligibility to the husband and require that he spend down $16,000 prior to being eligible for Medicaid. Under the "income first" rule, the agency would allow the wife to retain her $650 of monthly Social Security income, $578 per month of her husband's Social Security, and $67 of interest income equaling the MMMNA of $1295. If the husband lived two years and then died, under the "income first" rule, the wife would be left with $16,000 and a total of $650 per month of Social Security. Under a "resource first" rule, during the life of the IS, the CS would be permitted to retain all $32,000, her social security, monthly interest income of $133 and $512 of the IS monthly income (known as the CSMIA). If the husband lived two years and then died, under a

"resource first" rule, the community spouse would have $32,000 and $650 per month of Social Security.

See Ohio Adm. Code Sect. 5101:1-39-34, *et seq*.

Example 2
Same facts as Example 1, except, the wife receives income of $650 per month in Social Security benefits and $1350 per month in a company pension. Under either a "resource first" rule or an "income first" rule, the CS is entitled to keep $16,000 and her fixed income, while the IS must spend his $16,000 down to $2000 and must spend his fixed income to pay for his care. Thus the CSMIA would be $0. If the IS lived for two years, then died, the wife would be left with $16,000, her Social Security and her pension and would not, pursuant to the statute, be impoverished.

Example 3
Same facts as Example 1, except, the couple has countable assets of $70,000, and the wife's income is $1100 per month of Social Security. Based upon an interest rate of 5% per annum, she would receive $145 per month in interest income on the CSRA of $35,000. As her fixed income of $1100 per month and her interest income are short of the $1295 per month by $50 per month, she would be entitled to a small CSRA revision to $46,000. The IS spend down would then be reduced to $22,000. Once they had spent down to $46,000, she would be entitled to the $46,000 CSRA, her Social Security income and the interest on the $46,000, while all of the IS income would go to pay for his care. Upon the husband's death, pursuant to the statute, she would not be considered impoverished.

The State of Wisconsin, and their *amici* supporters ignore or mistake the economic position of most elderly women upon

the death of the husband. The surviving spouse is entitled to either her own Social Security income or her spouse's Social Security income level, whichever is higher, but not both. In Example 1, she would have fixed income totaling $650 at her husband's death. While the statute is not perfect, it does generally protect those who are most vulnerable to impoverishment.

Pursuant to 42 U.S.C. § 1396r-5(f)(2), the CSRA is established by the individual states. This statute grants discretion to the states, to establish the CSRA within certain guidelines. The minimum CSRA for 1996 was $15,348, and the maximum was $76,740. Congress specifically gave the states the discretion to adopt a minimum CSRA between the two figures, but did not grant similar discretion to the states for a methodology relating to CSRA revisions pursuant to 42 U.S.C. § 1396r-5(e)(2)(C).

After the initial CSRA calculation, the county agency must next calculate the MMMNA for the CS, pursuant to 42 U.S.C. § 1396r-5(d)(3) Generally speaking, this is the minimum monthly amount needed by the CS to avoid spousal impoverishment. In 1996, the minimum MMMNA was $1,295 per month, while the maximum was $1,919. Congress specifically granted the states the discretion to establish the MMMNA between these two figures, but did not grant similar discretion to the states for a methodology relating to CSRA revisions pursuant to 42 U.S.C. § 1396r-5(e)(2)(C).

When the IS is determined ineligible, the county agency is not empowered to make any determination as to whether the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the CS's income to the MMMNA. The next step in the process is for either the IS or the CS, after denial, to request a revision of the CSRA at a fair hearing to be conducted by a hearing officer. It is at this stage of the process where the appellate court held that the Petitioner

was violating 42 U.S.C. § 1396r-5(e)(2)(C), which provides as follows:

> (C) Revision of the community spouse resource allowance.
>
> If either such spouse establishes that the community spouse resource allowance (in relation to the amount of income generated by such an allowance) is inadequate to raise the community spouse's income to the minimum monthly maintenance needs allowance, *there shall be substituted for the community resource allowance under subsection (f)(2) of this section, an amount adequate to provide such a minimum monthly maintenance needs allowance*. (Emphasis added.)

According to the statute, the hearing officer has the authority and obligation ("there *shall* be substituted") to revise the CSRA if either spouse establishes that the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the CS's income to the MMMNA[3] If, as a result of this revision of the CSRA, the countable resources attributed to the IS are $2,000 or less, the IS is eligible for Medicaid benefits.

Only if the IS has been determined to be eligible for Medicaid benefits does the next step come into play: a determination is made of the CS's monthly income allowance (CSMIA), provided by 42 U.S.C. § 1396r-5(d)(2), for the purpose of determining whether part of the IS's income should also be transferred to the CS as a CSMIA. This income transfer is permitted only if the CS's monthly income, when combined with the monthly income from the revised CSRA, is still less than the MMMNA. (*See* Example 1 above.)

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3. The MMMNA may also be increased to a maximum of $1,919 in 1996, if the CS'S shelter costs exceed a certain level.

Example Illustrating Parties' Positions

Example 1 republished gives a practical illustration of how the above statutory provisions work:

> The husband (IS) entered into the nursing home in 1996 with his wife (CS) residing in an apartment, with countable assets of $32,000, and each receiving $650 per month in Social Security.

The county agency would initially set the CSRA at $16,000 and attribute the other $16,000 of countable resources to the IS. The county agency would further determine that the MMMNA is $1,295. Based on the initial calculations, the county agency would deny eligibility as the CS' countable resources exceed $2,000. Either the IS or the CS would have a right under 42 U.S.C. § 1396r-5(e)(2)(C) to request a fair hearing to establish the right to revise the CSRA, as the CSRA (in relation to the amount of income generated by such an allowance) is inadequate to raise the CS's income to the MMMNA[4]. It is at this juncture that the parties disagree as to what happens next.

The Blumer interpretation.

> The IS or CS would request a fair hearing and establish the right to revise the CSRA. The $16,000 CSRA would, with a 5% rate of return, only generate $800 of income a year, or $67 a month. Thus, when the $67 a month is added to the CS's social security of $650, the CS would only have monthly income of $717, which is well below the MMMNA of $1,295. Thus, the CSRA would be revised to $32,000 (which would provide the CS with income of $134 from the revised CSRA). This would leave no resources attributable to the IS and, therefore, he would be eligible for Medicaid benefits.

4. There is also a right to revise the MMMNA under certain circumstances.

After the determination that the IS is eligible for Medicaid benefits, the next step would be the post-eligibility determination of the CSMIA, as the CS's income would still be short of the MMMNA (she would have $134 of monthly interest income from the revised CSRA of $32,000, and $650 of her monthly social security, which would leave her $511 short). Thus, the CSMIA would be set at $511, or, in other words, $511 of the IS's $650 of monthly social security benefits could be transferred to the CS to raise her total income to the MMMNA of $1,295. The IS' remaining income would then be paid toward the nursing home costs. If the IS died two years later the CS would have $32,000, her Social Security of $650 and $134 of interest per month.

The State's "income first" rule.

Petitioner asserts that under the foregoing example, the IS should be declared ineligible for Medicaid benefits, even after a fair hearing. Under Petitioner's "income first" rule,

> The CS would not be entitled to a CSRA revision since the CS can reach the MMMNA of $1,295 through the $67 a month interest earned on the initial CSRA of $16,000, her $650 in social security, and by imputing $578 of the IS's social security to the CS. Consequently, the $16,000 originally attributed to the IS would continue to be attributed to him and he would not be eligible for Medicaid benefits until he spent down the $16,000 to $2,000. If the IS dies before the CS, and after he has spent down, the CS would be left with her $16,000 CSRA which generates $67 a month in interest income, and she would then be entitled to the amount of social security that was being paid to her late husband ($650); however, she would no longer receive her

> $650 of social security. Thus, the CS's monthly income would be $717 ($650 plus $67 per month of interest), which would leave her $578 short each month of the MMMNA, and by the standards established by Congress, impoverished.[5]

The Wisconsin appellate court properly recognized, as did the first Courts to address this controversy in [*See Kimnach v. Ohio Dep't of Human Serv.*, 645 N.E.2d 825 (Ohio Ct. App. 1994, *discretionary appeal not allowed*, 644 N.E.2d 409 (Ohio 1995), and *Gruber v. Ohio Dep't of Human Serv.*, 647 N.E.2d 861 (Ohio Ct. App. 1994), *discretionary appeal not allowed*, 646 N.E.2d 468 (Oh. 1995)] that the court should start with the statute. This Court has made it clear as to the starting point for interpreting a statute:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the

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5. In an attempt to minimize the consequences of an income first rule, the Solicitor General seeks to imply that the surviving spouse will not suffer a loss of social security benefits (the most common form of income the Appellants transfer under their "income first" rule) on the death of her husband. However, shrewd wording cannot hide the fact that although the surviving spouse may receive "a significant portion of the payments that would otherwise have gone to the institutionalized spouse during her life," The CS effectively loses his/her Social Security. 42 U.S.C. § 402(e). Thus, the CS usually will be forced below the MMMNA.

Another unacceptable result under the Appellants' "income first" rule is the situation when an IS may have income during his lifetime that ceases at the time of his death and is not transferred to his surviving spouse. Thus, under the above example, if the IS's $650 a month in income was a single life pension payment, the CS would receive none of it after his death.

> contrary, the language must ordinarily be regarded as conclusive.

Consumer Products Safety Comm'n v. GTE Sylvania, 447 U.S. 102, 108, 64 L. Ed. 2d 766, 772, 100 S. Ct. 2051, 2057 (1980). Furthermore, the judiciary is the final authority on issues of statutory construction and is obligated to reject administrative constructions that contradict Congress' express intent. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842, 843, 81 L. Ed. 2d 694, 702-703, 104 S. Ct. 2778, 2781-2782 (1984). "The Constitution holds that in decisions left to the democratic process the trade-off we are entitled to is the one the legislature provides. Courts have no apparent mandate to impose a different trade-off . . ." the Hon. Robert H. Bork, *The Tempting of America*, page 191 (1990).

The state is trying to convince this court to ignore the language of the statute and focus instead on that party's interpretation of the legislative history. The state seldom references 42 U.S.C. § 1396r-5(e)(2)(C) in its brief. The position of the OSBA and NAELA is that the language of the statute is clear and unambiguous, eliminating any need to examine legislative history. What the state is asking this Court to do is not to "interpret" the statute, but to re-write the statute.

The Wisconsin statute does not comply with 42 U.S.C. § 1396r-5(e)(2)(C). Only the HCFA memorandum creates the appearance of complying with federal law. The MCCA clearly provided the state with discretion to establish the CSRA between a floor and a ceiling, in 1996 $15,348 and $76,740, and the MMMNA between $1,295 and $1,919. Wisconsin, like several other states, provides an elevated minimum CSRA (currently $50,000). Ohio and many other states have chosen the lowest possible CSRA at $15,348 (1996 level).[6] The first courts which

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6. Ohio Administrative Code § 5101:1-39-36 provides that Ohio has adopted the minimal asset protection while OAC § 5101:1-39-221 adopts the minimal income protection.

reviewed the relevant statute, had no difficulty understanding or applying them. (*See Gruber* and *Kimnach*) These appellate courts held that the state was in violation of federal law [42 U.S.C. § 1396r-5(e)(2)(C)] by not revising the CSRA as required by statute and expressly rejected the so-called "income first" argument advanced by the Petitioner. *Kimnach* at 829-30.

The *Gruber* court had no difficulty understanding and applying the clear and ambiguous statutes, and specifically rejected HCFA letters purportedly approving an "income first" approach: "MCCA is unambiguous and therefore not open to interpretation by HCFA." 647 N.E.2d at 867. In addressing the state's argument, the *Gruber* court at pg. 868 stated, in part:

> A clear application of MCCA, without attempting to interpret what Congress' unwritten intentions were, produces a different result than appellee and the HCFA desire. There is absolutely no language in the MCCA that mandates that income should first be shifted as a CSMIA before the CSRA should be increased to allow the CS to generate sufficient income from the CSRA to reach the MMMNA level.

One could search endlessly through the federal statute and congressional record and never find any written "income first" rule. A review of decisions are all devoid of any finding of an "income first" rule, only references to the HCFA memorandum. The "income first" rule is a fiction.

The Wisconsin appellate court considered and rejected the analysis and conclusions of what would usually be considered more prestigious courts in *Cleary v. Waldman*, 167 F.3d 801 (3d Cir. 1999); *Chambers v. Ohio Dept. of Human Services*, 145 F.3d 793 (6th Cir. 1999) and *Golf v. New York State Dept. of Soc. Services*, 697 N.E. 555 (1998), and instead found the analysis and rationale employed by two Ohio appellate courts to be more persuasive. (*See Kimnach* and *Gruber*). These two decisions, like the Wisconsin appellate court decision avoid legislative judgments and the efforts to locate ambiguity, accepted by the courts in *Cleary*, *Chambers* and *Golf*.

2. The HCFA's "income first" rule is directly at odds with the spousal impoverishment protection of the MCCA.

In order to prevent the CS from being impoverished, the MCCA guarantees her a minimal level of assets "up front" by providing her with a transfer of resources on which she can rely no matter what happens to the IS or his income. That is why § 1396r-5(c)(2) provides that a meaningful portion of the couple's resources is to be allocated to the CS "as of the time of application for benefits." It is also why 42 U.S.C. § 1396r-5(e)(2)(A) guarantees that with respect to a challenge of the preliminary CSRA determination (and only with respect to a revision of the CSRA), a fair hearing "shall be held within 30 days" of the hearing request — to ensure that she has the correct amount of resources at the outset in order to prevent impoverishment.

Congress required couples to contribute a reasonable amount to the cost of the IS's care by clarifying patient liability in the MCCA so that the IS "paid as he went" for his care by contributing a carefully determined portion of his income to his medical cost. 42 U.S.C. § 1396r-5(d). As reflected in Examples 2 and 3 above, this often will be a substantial contribution because, once the CS has been brought up to the MMMNA, the IS's remaining income will be applied to the monthly cost of his medical care.

Further, the legislation limited eligibility for the program. Prior to MCCA, if the CS had substantial wealth that had been titled solely in her name for two years or more, and the IS was below $2,000, the IS could be eligible for Medicaid. The MCCA prevents a wealthy couple from being eligible by considering the resources of both the CS and IS. While there may still be examples where the CSRA seems unreasonably high or low, the Congress took great care in crafting language which protects most citizens who were impoverished pre-MCCA and restricting eligibility in most cases where eligibility should logically be denied.

The result is that the CS is assured a reliable minimum income that is based on the transfer of the couple's resources, yet the state can also look to the IS's income for a monthly contribution to the costs of medical care. The rationale for such an allocation of the couple's assets is that since the responsibility of the Medicaid system to the IS ends on his death, it makes the most sense to place the risk of fluctuations in his income (the most significant of which will usually occur upon his death) on the Medicaid system, rather than to place that risk on the CS as was done in pre-MCCA.

The approach advocated by the state and HCFA reverses this protection, forcing the couple to spend down resources, their most reliable generator of income, and forcing the CS to rely primarily on the income of the IS. In effect, this makes the couple contribute to the cost of the IS's medical care "up front," by paying the full cost of that care each month until their resources are exhausted, instead of contributing a portion of that cost each month via the IS's income. This results in the state paying a larger percentage of the medical costs once eligibility is established (because the "resource deprived" CS has been forced to receive the IS's income to bring her up to the MMMNA), but substantially delays eligibility until the couple has spent down their resources.

As a consequence, although the state's Medicaid obligation ends at the IS's death, the Petitioner would have the CS bear the entire risk of impoverishment since under their approach, she will have less resources left to offset the loss of her husband's income that occurs upon his death.

The most cursory reading of the Congressional Record during the adoption of § 1396r-5, reveals that Congress did not intend to abandon the CS. The MCCA, by specifically authorizing the substitution of resources prior to eligibility and requiring that the IS must contribute to his medical care out of his income, embodies a Congressional intention to protect the CS against impoverishment both during her husband's

institutionalization and after his death. The appellate court was correct in refusing to permit the Petitioner to frustrate that intent.

While the state on page 46 of its brief opines as to the "balance" created by the HCFA position, it appears that the CS was impoverished before the MCCA, and that many will now be impoverished by the "income first" rule. The states and the HCFA want to retain the benefit of limiting eligibility when the CS has substantial wealth, and deny the protections guaranteed by the MCCA to those most likely to be impoverished. This is not a balanced position. The MCCA was intended to end spousal impoverishment. The "income first" rule only delays impoverishment in many cases.

3. The State of Wisconsin has other more appropriate remedies.

If Wisconsin or any other state is unhappy with the spousal impoverishment provisions in general or specifically 42 U.S.C. § 1396r-5(e)(2)(C), they have three available remedies: (1) to withdraw from the Medicaid program; (2) to adjust the minimum levels of the CSRA and MMMNA to lessen the fiscal impact to the state; or (3) to enlist their Senators and Representatives to amend the spousal impoverishment sections, more to their liking.

Although withdrawing from the program may be financially unattractive, it is an option available to the states should they wish to avoid the entanglements with the federal government in this program.

The Congress established a minimum level for the CSRA ($15,348 in 1996). The House Conference Agreement notes in paragraph c on page 265 "The state, by amending its state plan, could raise the $12,000 minimum resource allowance for the community spouse . . ." ($12,000 was the original minimum CSRA and indexed). Twenty-one (21) states and the District of Columbia have retained the minimum CSRA ($15,348 in 1996), while twenty-two (22) have adopted the maximum figure ($76,740 in 1996), and seven (7) adopted a minimum CSRA

between $15,348 and $76,740 (1996 figures). Congress specifically granted the states the authority to adjust the minimum levels, and the states acted accordingly. If Wisconsin is concerned by the fiscal impact, it can revise the CSRA downward.

There has been no Congressional action to revise 42 U.S.C. § 1396r-5(e)(2)(C). Instead, several states have relied upon HCFA and the courts to emasculate the statute. The states have asked the courts to rewrite the 42 U.S.C. § 1396r-5(e)(2), instead of seeking relief from the legislature.

4. The legislative history of the MCCA does not support the Petitioners' argument.

Tellingly, the Petitioner's argument does not focus on the statute, but with some drafting history of the MCCA, only briefly alluding to the express language of 42 U.S.C. § 1396r-5(e)(2)(C). Obviously, this is backwards.

The legislative history cited by both the United States and the State of Wisconsin emphasizes the House Committee on Energy and Commerce Report's statement that the purpose of the MCCA amendments was to insure that the "community spouse has a sufficient — but not excessive — amount of income and resources available to her." H. Rep. No. 100-105, pt. 2, 100th Cong., 1st Sess. 65 (1987). In addition, the United States cites legislative history dating back to 1965 for the proposition that it is "proper to expect spouses to support each other." Brief for Amicus United States at 3, 17. These isolated statements give the misleading impression that Congress' primary goal was to limit the amount of income and resources available to the community spouse. In fact, the weight of the legislative commentary accompanying the 1988 amendments indicates that the overall legislative purpose was to alleviate the impoverishment of the community spouse in two ways: first by providing spouses with a statutory minimum standard of living, and second by providing the means for the spouse to demonstrate actual need for higher income and resources on a case by case basis.

Congress demonstrated this intent in its review of the Medicaid eligibility rules in effect prior to the enactment of MCCA. These rules were widely perceived by legislators as leading to the impoverishment of spouses, particularly of wives whose husbands needed long term care. The law at that time provided that when one spouse, the husband for the purposes of this discussion, entered into a nursing home or other institution, all of the income in his sole name, including his Social Security and pension income, was considered available to pay for the costs of his long term care needs. H. Rep. No. 100-105, pt 2, 100th Cong., 1st Sess. 66 (1987). The set aside for the maintenance of the needs of the community spouse, for her "maintenance needs level," was in most states tied to the extremely restrictive eligibility criteria of the SSI program. *Id.* The result of these rules was that, "both for determining eligibility and in the treatment of income after eligibility has been established, the spouse in the community may be left with income below the poverty level." H. Rep. No. 100-661, 100th Cong., 2d Sess., 258 (1987). Several legislators noted that the law created disproportionate poverty among elderly women, many of whom worked as homemakers during their lives, and therefore had little or no income in their own names. 133 Cong. Rec. S4321 (annual Ed. February 26, 1987) (statement of Sen. Mitchell).[7]

Moreover, community spouses who sought to increase what would otherwise be the maximum income allowance encountered unacceptable difficulties. Elderly couples were often faced with the need to sue their spouses for support, H. Rep. No. 100-105, pt 2, 100th Cong., 1st Sess. 69 (1987), yet it was the policy of HCFA to ignore the resulting court orders

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7. "Those most commonly affected by this Medicaid law are elderly women who have been homemakers most or all of their lives, and have little or no income in their own name"; *see also* 133 Cong. Rec. H9666 (annual Ed. April 23, 1987) (statement of Rep. Snowe) ("Because women live longer than men and tend to marry older men, the person left impoverished in the community is most often a woman").

and to consider all of the income of the institutionalized spouse, except for the "maintenance needs level" of his wife, as available to him. *Id.*

As for resources, prior law provided that all assets held only in the name of the institutionalized spouse, or in his name as joint owner with his spouse, were considered available to him for eligibility purposes. *Id.* at 67. Congress recognized that the law frequently required the couple to "spend down" virtually all of its resources before one spouse would qualify for Medicaid. As Senator Edward Kennedy stated:

> [A]lthough some elderly couples have sufficient savings and assets from which they can draw to pay these nursing home costs, for most the cost of long-term care far exceeds their available financial resources. . . . However, to become eligible for Medicaid, these elderly couples generally have to resort to a phenomenon commonly termed 'spend-down.' They must meet the state's medically needy resource standard by depleting their lifetime of savings and assets. This requires that both the at-home spouse and the institutionalized spouse become impoverished before Medicaid coverage for nursing home care is achieved. 133 Cong. Rec. S6112 (annual Ed. March 18, 1987) (statement of Sen. Kennedy).

Congress recognized that an all too common result of this spend down requirement was that the CS would herself become dependent on public welfare programs. 133 Cong. Rec. H9666 (annual Ed. April 23, 1987) (statement of Rep. Snowe).

The House Committee on Energy and Commerce report regarding the passage of MCCA summarized its concerns regarding spousal impoverishment as follows:

> Committee Bill. The [impoverishment] of individuals whose spouses reside in nursing homes and receive

Medicaid benefits is not justifiable. The current maintenance needs levels for community spouses, which are limited by current Federal regulation, are inadequate. In some cases, they have forced community spouses, in desperation, to sue their husbands for support. The financial duress that these low maintenance needs levels impose on the community spouse may, in certain cases, even force the premature institutionalization of that spouse.

The Committee Bill would end spousal impoverishment. It revises the current Federal requirements relating to attribution of income, attribution of resources, transfer of resources and post-eligibility application of income. These revisions are limited to the context of a couple with one spouse in an institution who applies for or receives Medicaid. *The purpose of these revisions is to assure that the community spouse in these circumstances has income and resources sufficient to live with independence and dignity.* H. Rep. No. 100-105, pt 2, 100th Cong., 1st Sess. 66 (1987) (emphasis added).

One of the core principles incorporated into the MCCA amendments was the avoidance of rigid limits on the community spouse's income and assets which existed in prior law. As the Committee put it, "the $1500 limit on the minimum monthly maintenance needs allowance is not absolute." *Id.*, at 72. Instead, the Committee repeatedly asserted the principle that the community spouse's income should be "adequate" to meet that spouse's actual needs:

> The bill makes it clear that an institutionalized spouse who believes that the minimum monthly maintenance needs allowance for the community spouse is inadequate, or who believes that the state has not accurately determined the amount of monthly

> income actually available to the community spouse from other sources, is entitled to a fair hearing . . . .

Id.

The bill passed by the Committee contained several methods to provide the community spouse with "adequate" support in excess of what would otherwise be her maximum income and resource levels. One method, the subject of the instant proceeding, was to allow either spouse to request a hearing to increase the community spouse's resources to generate sufficient income to raise the community spouse's income to the MMMNA. H. Rep. No. 100-661, 100th Cong., 2d Sess., 265 (1987). It is important to note, however, that Congress also intended the fair hearing process to be a forum in which a spouse may demonstrate that her individual circumstances merit income and resources in excess of this amount.

The House Committee provided that:

> [T]he institutionalized spouse is entitled to an opportunity to demonstrate, at a fair hearing, that the minimum monthly needs allowance is inadequate to support the community spouse without financial duress. If the spouse makes this showing, by a preponderance of the evidence, the state would be required to establish an adequate monthly maintenance needs allowance in that case.

Id.

The Senate bill contained similar provisions. It held that if "either the minimum monthly maintenance needs allowance or the community spouse resource allowance (in relation to the amount of income generated by such allowance) is not adequate to support the community spouse without financial duress, the amount of either support is to be increased." *Id.* at 264. The bill that emerged from Conference Committee followed the Senate amendment, modified so that:

> [I]f either the community or institutionalized spouses establishes in a fair hearing that, due to exceptional circumstances resulting in significant financial duress, the community spouse needs income above the minimum monthly maintenance needs allowance, the state is required to increase the allowance to provide this amount, notwithstanding the $1500 statutory ceiling.

Id. at 266. Thus, the hearings officer is charged with more than simply ensuring that the community spouse's income rises to the MMMNA level. The officer is also obligated to take a comprehensive look at the unique circumstances facing each spouse and to determine the appropriate levels of either income or resources to be allowed in each individual case.

To the extent that the Petitioner urges this Court to interpret the law consistently with "the spirit" of the MCCA, the Petitioner's "income first" interpretation should be rejected since its primary effect is to increase the incidence of spousal impoverishment by reducing the amount of resources a CS is entitled to retain.

5. The HHS and the HCFA are not entitled to deference relating to 42 U.S.C. § 1396r-5(e)(2)(C).

The state asserts that the Court should defer to the HCFA and "to administrative interpretations of the provision," particularly where "agencies at both the federal and state level have embraced the rule". While the OSBA and NAELA do not wish to unfairly criticize the HHS and the HCFA, the actions of these federal agencies are the root cause of the confusion at the state level and untold hardship for countless beneficiaries. It is the position of OSBA and NAELA that the HHS and the HCFA positions on "income first" do not deserve deference from this or any other court on this issue for four reasons: (1) The Congress did not delegate authority on this issue to the agencies; (2) The agencies have been inconsistent in the positions taken; (3) The agencies' interpretations are inconsistent

with 42 U.S.C. § 1396r-5(d)(1)(B); and (4) the HCFA "income first" rule is a litigation position.

In *United States v. Mead Corp.* 121 S. Ct. 2164, 2171, 150 L. Ed. 2d 292 (2001) the Court stated,

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

Congress specifically authorized and required that the agency annually recalculate the minimum and maximum CSRA and MMMNA figures. Congress left certain discretion to the states to set the minimum and maximum CSRA and MMMNA. Congress went into so much detail in establishing this statute that HCFA did not promulgate proposed regulations until after the Court granted the writ of certiorari.

The state also fails to explain a portion of the March 3, 1994 HCFA letter which undermines any argument of Congressional intent by stating:

> The "income first" rule is not specified by the statute and as such is a "derived" policy. . . . We would now like to clarify that states have the option to use the "income first" rule or to apply some other reasonable interpretation of the law . . .

The HCFA created a policy not "specified by the statute" and gave the states the "option" to use an "income first" rule. What the state, the HHS and the HCFA have failed to explain is who gave the HCFA the authority to create policy or grant the

states this "option". Moreover, until September 7, 2001, the HHS admittedly had not even issued proposed regulations regarding the spousal impoverishment provisions of the MCCA.

The state in its brief on page 41 states that the lower court was "wrong" when it found that HHS had "waffled" about its interpretation, and suggests that a review of the available evidence clearly proves that point and then recites from the three HCFA letters in 1993 and 1994. It is interesting to note that, in its brief the state failed to include a December 8, 1992, letter from the Department of Health and Human Services to attorney John Ford (Schedule 1), which appears to mandate a "resource first" rule, stated as follows:

> We note that Section 1924(e)(2)(C) of the Act requires that if either spouse establishes, at a fair hearing, that the CSRA is inadequate, in terms of the income the resources generate, to raise the community spouse's income to the MMMNA, the state must substitute a resource allowance that is adequate to provide a minimum MMMNA. That is, the state must substitute for the CSRA a resource allowance to raise the community spouse's income up to the MMMNA.

This HCFA letter is inconsistent with the 1993 and 1994 HCFA letters and the letter from former HHS Director Shalala to former Governor Voinovich.

The 1992 letter to attorney John Ford, would lead one to believe that "resource first" was the only possibility. The subsequent 1993 proclamation issued by the HCFA Chicago regional office, lead the states to believe that "income first" was the only policy, while the March 3, 1994, and July 1994 letters appear to grant the states unlimited discretion in granting CSRA revisions. It is clear from this chronology and from the lack of any meaningful effort by HCFA to investigate Congressional intent for thirteen (13) years, that the agency is following an agenda separate and part from the MCCA and beyond its administrative function.

The letters from HHS and HCFA hardly constitute authoritative administrative interpretation made under a specific grant of authority to which this Court must give deference. *See John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993) (declining to give deference to the Department of Labor where agency "apparently had no firm position").

Moreover, even if the proclamations that support the "income first" rule somehow were deemed an authoritative agency interpretation, the rule would not deserve deference because it is arbitrary and expressly contradicted by the MCCA. Petitioner requires that prior to eligibility, the IS must transfer the maximum amount of income to the CS under section 42 U.S.C. § 1396r-5(d)(1)(B) *before* being allowed to employ section § 1396r-5(e)(2)(C) to raise the CSRA. This "interpretation" of the MCCA reverses the order expressly provided for by the statute. The 42 U.S.C. § 1396r-5(d)(1)(B) income transfer can only occur after the IS "is determined or redetermined to be eligible" for Medicaid, while the Section 1396r-5(e)(2)(C) resource substitution occurs prior to eligibility. The Wisconsin appellate court in paragraph 22, the *Gruber* court on page 868 and the *Kimnach* court on page 647 all note this inconsistency in the "income first" argument.

By contrast, the United States Supreme Court in *Chevron* accorded deference to an EPA regulation, formally promulgated pursuant to the notice and comment provisions of the Administrative Procedure Act, which was implemented pursuant to an explicit grant of authority by Congress. This Court denied *Chevron* deference in *Smiley v. Citibank v. Citibank (South Dakota)*, 517 U.S. 735, 135 L. Ed. 25, 116 S. Ct. 1730 (1996), where the Court considered whether two agency letters, similar to those relied on here by Appellants, constituted evidence of a prior administrative policy. A unanimous Court concluded that they did not:

> [w]e doubt whether either of these statements was sufficient in and of itself to establish a binding agency policy — the former because it was too informal, and the latter because it only purported to represent the position of the Deputy Chief Counsel in response to an inquiry concerning particular banks. Nor can it even be argued that the two statements *reflect* a prior agency policy since, in addition to contradicting the regulation before us here, they also contradict one another.

Id. at 743 (emphasis in original). This is entirely consistent with the Court's statement earlier in *Smiley* that "*we deny deference* 'to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice.' " *Id.* at 741, *citing Bowen v. Georgetown University Hospital*, 488 U.S. 204, 212, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988) (emphasis supplied). *See also Rowan Cos. v. United States*, 432 U.S. 247, 68 L. Ed. 2d 814, 101 S. Ct. 2288 (1981) (Treasury regulation promulgated under general authority to prescribe needful rules and regulations owed "less deference than a regulation issued under a specific grant of authority to define a statutory term or to prescribe a method of executing a provision.")

This Court specifically addressed a similar opinion letter in the recent case, *Christensen v. Harris County*, 529 U.S. 576, 587, 146 L. Ed. 2d 621, 631-632, 120 S. Ct. 1655 (May 1, 2000), and stated,

> Here, however, we confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretation such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all which lack the force of law — do not warrant *Chevron*, deference.

The Court further states,

> Of course the framework of deference set forth in *Chevron* does apply to an agency interpretation contained in a regulation. In this case the Department of Labor's regulation does not address the issue of compelled compensatory time.

Based upon the majority opinion, the Court should not give deference to these HCFA proclamations.

The HCFA was a party defendant in the matter of *Herley v. Houston*, Eastern Dist. of Pennsylvania District Court, Case No. CV93-3666, which was filed in 1993. The case involved the implementation of 42 U.S.C. § 1396r-5(e)(2) by the State of Pennsylvania. The HCFA moved to be dismissed as a party and created the HCFA memos cited by the State of Wisconsin in this case, as support for HCFA's Motion to Dismiss.

In *Kimnach* and *Gruber*, these HCFA letters were cited in 1994 to support the state's fair hearing decisions issued in 1993 by the State of Ohio (which had been appealed).

This coordinated effort on the part of the state and the federal agency was culminated by the March 28, 1996 letter from former HHS Secretary, Donna Shalala to former governor George Voinovich, which is included in the Joint Appendix at page 90a. This letter supports the *amici* position that the HHS and HCFA either acted in concert or in support of the state agencies against the program beneficiaries.

The Petitioner is asking this Court to defer to the HCFA litigation position in this case. However, as the Supreme Court observed in *Smiley* at 740-741, a litigating position is not entitled to such deference.

The MCCA was landmark legislation, which was intended to "end spousal impoverishment" and significantly changed eligibility criteria. Whether the agency intended to take all possible positions, or intended to allow the states to develop their policies, or whether the agency decided to indirectly create

its own independent policy, this Court should not be swayed by proposed regulations issued thirteen (13) years after the enactment of the statute. The confusion exhibited by the HCFA has led to confusion of the states. While the Petitioner claims that over thirty (30) states employ an "income first" rule, it admits in footnote 11 that only five (5) states have "codified" the rule in a statute or administrative rule. If such a rule exists in most of these thirty (30) states, how did it come into being, upon what authority, how can the citizen locate the rule and why did the HCFA approve these state plans with unwritten policies? To summarize, the HCFA has announced a "derived" policy not specified by statute and twenty-five (25) states have implemented this policy without codification. It is the position of the OSBA and NAELA that Congress did not extend any discretion to the states or the HHS or the HCFA relating to CSRA revisions, in 42 U.S.C. § 1396r-5(e)(2)(C) and that the Courts should not give deference to these informal agency opinions.

CONCLUSION

For these reasons, the Court should look to the statute for guidance and ignore the HCFA proclamations. As was evident to the Wisconsin appellate court and in accordance with the opinions expressed by the Court in *Christensen*, based upon the detail of the statute in question, Congress did "not leave this significant issue unaddressed". Rather, the Congress considered the totality of the financial security of the CS in an effort to "end spousal impoverishment".

The Wisconsin Court of Appeals decision represents a traditional approach for the Court, which is centered upon strict statutory construction and judicial restraint. It correctly found that Congress' intent as established in the statute is not ambiguous, although it is by its nature complex. Congress included great detail in this legislation, not only as to its intentions in protecting the CS, but also into what items were reserved for the states. The "income first" rule does not end spousal impoverishment, it only delays impoverishment. If this Court overrules *Blumer* and passively approves the *Chambers* and *Cleary* decisions, it will have effectively repealed 42 U.S.C. § 1396r-5(e)(2)(C) and will permit the states to impoverish many elderly individuals whose spouses are placed in nursing homes, whom Congress intended to protect.

Respectfully submitted,

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